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JOHN E. DAVIS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. ~~1108~~ 92

EDGAR D. WHITCOMB, Governor of Indiana and Chairman of the State Election Board,
Appellant,

vs.

PATRICK CHAVIS, et al.
Appellees.

On Appeal From The United States District Court For The Southern District Of Indiana

BRIEF OF THE APPELLEES

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OPINIONS BELOW

The July 28, 1969 opinion of the District Court appears at 305 F.Supp. 1364 and the December 15, 1969 opinion appears at 307 F.Supp. 1362. The opinions appear at pages 331 and 390 of the single appendix.

JURISDICTION

Final judgment in this cause was rendered on December 15, 1969 and a notice of appeal was filed on December 21, 1969 and the appeal was docketed within time, on February

18, 1970. This Court has jurisdiction under Title 28, United States Code, Section 1253.

QUESTIONS PRESENTED

1. Whether the district court was clearly erroneous in finding that fifteen-member and eight-member legislative districts in Marion County, Indiana dilute the voting rights of negro ghetto residents.

2. Whether Uniform Districts are required by the one-man-one-vote principle.

STATEMENT OF THE CASE

This action was brought on January 9, 1969 as a 42 U.S.C. 1983 lawsuit for the purpose of requiring a subdivision of the multi-member state legislative seats apportioned to the most populous [Marion] county in the State of Indiana. On July 28, 1969 the lower court rendered a decision finding that the legislative districts for both houses of the Indiana General Assembly were malapportioned on a traditional one-man-one-vote basis apart from the plaintiff-appellees' complaint as to the multi-member districting of Marion County, Indiana. The lower court further ruled that a reapportionment of the Indiana General Assembly would be necessary before the next election. The lower court also found that the multi-member districting of Marion County, Indiana diluted the voting rights of citizens of a *Ghetto Area*[1] and suggested that this factor

[1] Defined by the lower court as: "A primarily residential section of an urban area characterized by a higher relative density of population and a higher relative proportion of substandard housing than in the overall metropolitan area which is inhabited predominantly by members of a racial, ethnic, or other minority group, most of whom are of lower socio-economic status than the prevailing status in the metropolitan area and whose residence in the section is often the result of social, legal, or economic restrictions or custom.

as well as a *Uniform Districting*[2] principle should be considered by the State of Indiana in any reapportionment which it might conduct. The State of Indiana was given sixty days in which to act. The State of Indiana took no action. Then on December 15, 1969, after considering various reapportionment plans submitted by various parties and non-parties, the lower court ordered its own reapportionment plan into effect adopting as part of its plan a districting plan for Marion County, Indiana which had been submitted by the plaintiffs. It was this order of December 15, 1969 that subsequently was stayed by this Court.

SUMMARY OF ARGUMENT

Certain negative descriptions of appellee's case are appropriate to this summary. Appellees do *not* contend that the race or ethnic background of legislators can have anything but the most minimal significance in determining whether the citizens of a given locality are entitled to have a multi-member legislative district broken up. Appellees likewise do *not* contend that any demonstration as to where the elected representatives live within a multi-member legislative district can constitute a conclusive or near-conclusive showing that any voting rights dilution results from such a district. Finally, appellees do *not* contend that minority groups are entitled to have district lines drawn in such a manner as to enhance their voting power. To the extent that the appellants and amici have suggested that the appellees are relying on the three foregoing possible contentions they have mis-characterized the appellees' case.

The appellees contend that there is in Marion County, Indiana a cluster of census tracts which are characterized

[2] I.e., that legislative districts in each legislative house must be identical in population rather than merely have the same proportion between number of residents and number of legislators.

by racial, social and economic attributes demonstrable by census statistics and by other statistics and that these attributes cause the citizens and voters living in this cluster of census tracts to have substantive legislative interests which diverge significantly from those of the citizens living in the balance of the county. The appellees further contend that this cluster of census tracts which the lower court referred to as "*The Ghetto Area*" is of a size sufficient to dominate the vote in two to four single member representative districts and one or more single member senate districts but not of a size sufficient to significantly influence county-wide elections in Marion County's county-wide multi-member district. This is so, the appellees will demonstrate, not only because the county-wide vote is large in comparison to the Ghetto vote, but also because there is a white-suburbanite belt in Marion County which is statistically as cognizable as the Ghetto Area and which regularly casts a bloc vote politically the opposite of the bloc vote cast in the Ghetto area, cancelling out the Ghetto's bloc vote in county-wide elections. It also will be shown that the proof in the trial court below demonstrated that the bloc vote in the Ghetto area is not the result of inverse racism and is directed only to substantive interests. For example, at the time of trial, three of the fifteen members of Marion County's house delegation to the Indiana General Assembly were Negro but all three had been beaten by a three-to-one vote in the Ghetto Area in the county-wide election which put them in office. Their losing opponents were white. All three regularly voted *en bloc* with the remainder of the Marion County house delegation and these votes included at least three which were obviously inimical to the voting rights of negroes. It was and is the contention of the appellees that the demographic and socioeconomic facts which obtain in Marion County, Indiana entitles the voters of the Marion County Ghetto to such subdivisions of Marion

County's legislative district as would render it possible to elect legislators who would consider themselves beholden to the substantive interests of negroes and poor persons if they desired to be re-elected. It is in no way the contention of the appellees that there should be a certain number of black faces on the Marion County state legislative delegations. The evidence demonstrated conclusively that the ghettoization of the people in Marion County's Ghetto Area was an involuntary one resulting from historical factors of a type often noted by this Court in relation to the South. The evidence, in short, demonstrated that the continued multi-member districting of Marion County legislative seats would permit the affluent and near-affluent majority in Marion County, Indiana to cause their state government to ignore the interests and needs of those whom they have segregated from their neighborhoods, their schools and from other public services and facilities.

The appellees also contend that the uniform districting of state legislative delegations particularly in Indiana, is a distinct Constitutional must. The evidence below showed that county party organizations in Indiana control the nomination of state legislators, particularly in large metropolitan areas, and dominate and control the activities and votes of such legislators in the General Assembly. The general bloc voting propensities of multi-member district delegations also was demonstrated. Together with the foregoing it also was shown that multi-member districts of differing size constitute a mathematical violation of one-man-one-vote. The mathematical demonstration was based on the premise that any meaningful enforcement of the one-man-one-vote principle must take into consideration the self-evident fact that the degree of responsiveness which a voter can expect from his government exists in direct proportion to the likelihood that such a voter may, on some future occasion, cast a deciding vote. This self-

evident principle carries over and is applicable to the degree of influence which the legislators which the voter elects may exert in the legislature. It is evident, as a practical matter, that voters who elect a fifteen-member multi-member district delegation to a one-hundred-man legislative body will enjoy distinct mathematical advantages over the voters in single-member districts and in smaller multi-member districts particularly where, as here, the multi-member district delegations indulge in intensive bloc voting. It is not as evident but definitely a fact [a fact admitted by appellants in the lower court] that the mathematical likelihood that a voter will cast a decisive vote does not decrease in inverse proportion to the increase in the size of a voting district where additional representatives are provided such district to compensate for its increased size. The decrease is, rather, proportionate only to the increase in size of the square root of the raw figures involved.[3]

There are additional reasons for holding that uniform districting is a Constitutional must. These result from recent decisions by this Court holding that the boundary lines of geographic sub-divisions must be disregarded in the quest for one-man-one-vote perfection and holding that a reapportionment plan which comes closest to achieving such perfection must be regarded as the only legal plan. The elimination of county lines and other geographic and political sub-divisions lines as a basis for permitting slight one-man-one-vote deviations results in an unprecedented license for political cartography in the drawing of state legislative districts unless the "nearness-to-perfection" criterion is enforced with the same vigor which the states

[3] E.g. Given a voter in a district with four voters and one representative vis-a-vis a voter in a district with sixteen voters and four representatives, the likelihood that the second given voter will cast the deciding vote in the election of any given legislator is one half and not one fourth that of the same likelihood in the case of the first given voter.

themselves previously have employed in enforcing the preservation of county lines and other political subdivision lines. To permit multi-member districts of differing size necessarily would involve permitting the enactment of reapportionment plans which would not be subject to comparison with other plans and which could achieve "near-perfection" under naive one-man-one-vote criteria while enjoying an almost total license to gerrymander. In the State of Indiana, if either of the major parties were to have control of the legislature together with such license in the next assembly session in which a reapportionment is to take place, either such party could achieve an almost assured eighty percent of the membership of the Indiana General Assembly during the following decade regardless of the outcome of future elections. The principle of uniform districting is necessary to a meaningful implementation of the one-man-one-vote mandates of this court and the principle of small districts where socio-economic classes in the state are involuntarily ghettoized is necessary to a meaningful and responsive state government, and necessary as well to the vindication of the voting rights of all citizens.

I

The Lower Court's Finding That Fifteen-Member And Eight-Member Multi-Member Legislative Districts In Marion County Constitute A Voting Rights Dilution was not Erroneous

On pages 21 through 23 of his brief the Appellant, Whitcomb presents a critique of the analysis by which the lower court determined that a Ghetto Area exists in Marion County, Indiana which has substantive interests which diverge significantly from the substantive interests of the balance of the citizens and voters of Marion County, Indiana. The

lower court did use a different method in demonstrating the existence of a Ghetto Area in Marion County from that used by appellees in their complaint and proof. The appellees used the plodding device of selecting the census tracts in Marion County, Indiana which have the highest percentage of negro population and which are sufficiently contiguous to form a cluster and then performing arithmetical averagings of their other social characteristics and comparing them to the characteristics of the balance of Marion County. The lower court adopted a far more sophisticated method of analysis in rendering its opinion. This happened because the lower court had available to it certain expensive and comprehensive socio-economic studies of Marion County, Indiana which had not been known to or available to the appellees at the time they were preparing their case. These studies were introduced into evidence at the trial by the defendant-appellants and it is to be noted that almost all of the lower court's statistical findings are based upon defense exhibits rather than upon the evidence of the plaintiff-appellees.

On page 22 of his brief the appellant, Whitcomb urges that "rather than selecting census tracts randomly from the county to discover whether there was an area which within the county sufficiently differentiated from the rest of the county, the district court's starting point was that a 'ghetto' did in fact exist. If reasoned from its own assumptions." While the lower court's opinion might be characterized as indicating that the conclusion that a Ghetto Area exists in Marion County was a conclusion quickly arrived at, it does not follow that the lower court was assuming the existence of such a ghetto and reasoning from its assumptions. The appellants are ignoring the evidence which was presented at the trial and which was so conclusive as to the existence of the alleged ghetto as

to leave the lower court very little to determine on that point.

At the conclusion of the plaintiff-appellees' case a total of 118 admitted requests for admissions were introduced into evidence without objection by the State of Indiana (App. 257, 258)

These admitted requests for admissions in evidence include and cover the following facts: "That 1960 United States Census tracts 220, 501, 502, 503, 508, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 528, 529, 530, 531, 534, 535, 536 and 540 are contiguous tracts in Marion County, Indiana [2][4] and that as of the 1960 United States Census the 1960 Ghetto Area so described contained 105,808 inhabitants including 75,221 negro or non-white inhabitants and about 30,587 white inhabitants. [5] As of the 1960 census the balance of Marion County, Indiana, outside the 1960 Ghetto Area consisted of only about 4.17% negro inhabitants. [9]

As of the 1960 Census the aforesaid 1960 Ghetto Area contained about 15.8% of the inhabitants of Marion County, Indiana [10] while containing about 40.05% of the dilapidated housing units in Marion County, [11] 29.12% of the Marion County population dependent upon public transportation to go to and from work, [12] about 22.00% of the Marion County population housed in dwellings containing fewer rooms than inhabitants, [13] and 28.74% of the unemployed in Marion County. [14] As of 1960 the median family income for Marion County was $6,609 [15] while the median family income for negro families living in Marion County Census tracts with more than 400 such

[4] This number and the numbers in parentheses which follow are the numbers of the admitted requests for admissions which established the facts recited immediately before each such number. [See App. 92-115]

families was $4,390. [16] The 1960 Ghetto Area also had 31.47% of the Marion County inhabitants over 25 who had not completed four years or more of formal education [i.e. statistical functional illiterates] [17] and only 3.86% of the college graduates of Marion County [19] when four census tracts are excluded from the Ghetto cluster on the basis of the fact that they are populated in part by white university students and graduate students living near institutions of higher learning. [22] As of 1960 the median years of education was 11.5 years for residents of Marion County over age 25 while the comparable figure for non-whites in Marion County was 9.2 years [19]. Other admissions established that: *De Facto* segregation is rampant in the public schools of Marion County [29], infant mortality for non-whites is far greater than the rate for whites [30], as is the mortality rate for non-infants [31], 72% of the Aid for Dependant Children was for negroes in Marion County as compared to a negro population percentage figure of about 14% [32], the illegitimate birth rate among non-whites in Marion County is far greater than it is among whites [33], and that the handling of negro juvenile cases were and are, as a matter of uncontrollable circumstances and as a matter of policy, far more likely to result in a life of crime in the case of negro youths in Marion County and in Indiana than in the case of white youths. [35-37] It also was admitted that the aforesaid Ghetto Area would almost certainly control the election of at least three representatives and one senator to the Indiana General Assembly in the event of single member districting [55 & 56] and that in a recent election in which the substantive interests of negroes and poor people were very much in issue, the Ghetto Area of Marion County had returned a substantial bloc vote nominally consistent with such interests while the county-at-large cast a vote sufficiently similar that the Ghetto bloc vote was unneces-

sary to the county-wide result which was achieved. [57-65]

The admitted requests for admissions in evidence also demonstrated that as of the 1960 census there was an area in Marion County, Indiana which could be labeled "The White Suburbanite Belt" which consisted of Marion County outside Indianapolis which contained 31.68% of the Marion County population [74] while containing 44.02% of the families in Marion County which had a family income of more than $9,000 [75], 38.38% of the college graduates living in Marion County [77], 51.51% of the houses containing more than one bathroom in Marion County [81] and it delivered 48.73% of the vote cast for the party not supported by the Ghetto Area in the last preceding election [82] while it contained only 18.37% of the families which had a family income of less than $4,000, only 13.46% of the dwelling units built before 1939 [78], only 1.86% of the negroes [79], and only 14.43% of the deteriorating or dilapidated houses in Marion County, Indiana.

The said evidence presented regarding the Ghetto Area vis-a-vis the remainder of Marion County, Indiana demonstrated that the complained of multi-member districts "operate to minimize" . . . "the voting strength" of the Ghetto Area and the said evidence presented regarding the Ghetto Area vis-a-vis the White Suburbanite Belt in Marion County, Indiana demonstrated that the said multi-member districts "operate to . . . cancel out the voting strength" of the Ghetto Area echoing the guidelines uttered in *Fortson v. Dorsey*, 397 U.S. 433, 85 S. Ct. 498, 13 L.Ed.2d 401, 405 [1965] and in *Burns v. Richardson*, 384 U.S. 73, 86 S.Ct. 1286, 1294, 16 L.Ed.2d 376. No other conclusion could have been reached by the lower court in view of the foregoing, uncontradicted and admitted evidence. The said evidence was supplemented by the uncontradicted testimony of plaintiff-appellee Patrick Chavis [App. 176-200] to the

effect that the above-described socio-economic characteristics of the Ghetto Area caused its voters to have the particular substantive legislative interests outlined and alleged in memorandum seven to the complaint in this cause. [App. 41, 42] At no point in the proceedings in the lower court did the appellants allege, contend or even suggest that a Ghetto Area of the type alleged did not in fact exist in Marion County, Indiana. For these reasons it did not constitute circular reasoning and it did not constitute an unsupported assumption for the lower court to begin with the fact of Ghetto Area in Marion County in the reasoning set forth in its opinion.

II

The One-Man-One-Vote Principle Requires Uniform Legislative Districts

It is the belief of the appellees that the "Uniform Districting" question presents the most important aspect of this case. The lower court suggested but did not flatly rule in its original decision that a fulfillment of the one-man-one-vote Constitutional mandate would require uniform legislative districts. Then, when forced to draft a court-drawn reapportionment plan, the lower court mandated a plan which provided uniform districts in the form of single-member districts. Although the record in this cause does not contain an outright ruling that it is not sufficient for legislative districts to contain the same ratio of citizens or voters per legislator, the appellees will deal with this question as if there had been such an outright ruling in the lower court. The lower court's rulings did fall barely short of constituting such a mandate.

The notion that one man one vote requirements are fulfilled where the same number [X] results from the follow-

ing mathematical study of legislative districts—

$$\frac{\text{Number of People In District}}{\text{Number of Legislative Seats In District}} = X$$

is a commonplace notion. But the notion is demonstrably refuted when the study by John Banzhaff which was first published at 75 *Yale Law Journal* 1319, attested to by Mr. Banzhaff in the lower court [App. 139-155] and admitted to in the requests for admissions [App. 112-115] is considered.

There is no basis for contending that ten citizens represented by one legislator would have a voice equal to that of one hundred citizens represented by ten legislators. The value of a voting franchise must be regarded as proportionate to the potential which the vote has to change the result of an election. To ignore this criterion would constitute regarding the exercise of a voting franchise as a hollow ritual. When the said criterion is considered there is an obvious difference between the vote of ten citizens who elect one legislator and that of one hundred citizens who elect ten legislators.

In a head-on race between two candidates or in a yes-no ballot on a pending measure in a legislature the number of possible vote combinations is equal to the number two multiplied by itself the number of times that there are voters. In a district containing ten citizen-voters the number of possible voting combinations is two to the tenth power. In a district containing one hundred citizen-voters the number of possible voting combinations is two to the one hundredth power and, given the fact of ten legislative races, this large number must be multiplied once more by ten. As the number of voters in a hypothetical district increases the number of possible voting combinations increases on a rapidly accelerating geometric curve. But what increases even more rapidly is the number of voting

combinations wherein the result could be effected by a shift of only one vote. This fact is demonstrated by admitted request for admission No. 118. [App. 112] From a purely mathematical standpoint this must be considered as the measure of the value of a vote and a vote cast in a bloc-district [multi-member district] which is large in size must be regarded as having greater mathematical potential than a vote cast in a smaller bloc-district or in a single-member district.

The obvious question which the foregoing presentation gives rise to is that of whether the fact that a voter in a large multi-member district has a greater mathematical chance to cast a crucial vote has any practical significance. A large amount of evidence was presented in the lower court demonstrating that multi-member districts of differing size cause voting inequities and dilutions in practice as well as in theory.

The strongest evidence presented on the matter of [non-minority-group] inequities resulting from Marion County, Indiana's fifteen member and eight member multi-member legislative districts came from the testimony of the appellant, Whitcomb's own expert witness who testified that it is a "significant advantage . . . for Marion County to go to the legislature with a single vote of fifteen representatives." [App. 319] The appellant, Whitcomb's expert, of course, based his conclusion upon a tacit assumption that the individual representatives and senators from Marion County vote on legislation with a "single voice." The evidence presented by the plaintiff-appellees repeatedly demonstrated that this assumption was correct.

A former county chairman for one of the major political parties who also was a former Indiana General Assemblyman testified that he was elected as an assemblyman only because his party organization supported him [App. 207]

and he was defeated when not so supported [App. 208] and that he knew of no one who had been elected or re-elected within his memory who had not been supported by the party organization [App. 209] and that he always voted at his party's call when in the General Assembly [App. 207] and that he supervised a Marion County General Assembly delegation working with his successor county chairman and there were no renegade votes or acts by any member of the Marion County delegation during that General Assembly session. [App. 210].

Another former general assemblyman testified that he was nominated and elected from Marion County solely because he had the support of the county chairman who previously had testified [App. 218]. He testified that his nomination was accomplished because all of the precinct committeemen in the county handed the voters "slates" containing his name when they voted in the primary and that his name was on this slate because the precinct committeemen voted for him at a "slating convention" and he received their vote at that convention because his name was on a list which the county chairman had passed to the committeemen as they voted at the convention. [App. 218] This former assemblyman further testified that he consulted with his county chairman almost every day during the General Assembly's session [App. 219] and that he always voted pursuant to the requests of his county chairman [App. 220] even to the point where he once sponsored a bill without reading it sufficiently to know that it was inimical to the interests of a municipal client represented by his law office with the result that he encountered the embarrassing situation of voting against his "own" bill which passed anyway. [App. 221]

A former general Assembly candidate testified that he had twice ran in the primary for the General Assembly and

had been nominated when slated and had been not nominated when not slated and that there was a very substantial difference between the vote he received when slated and when not slated [App. 227]. Still, another former General Assembly candidate, [who also was the only prevailing Marion County plaintiff in this cause] testified that he was slated and nominated as a candidate to the General Assembly after he was recruited as a candidate in a phone call from the county chairman. [App. 229-230]

A witness connected with the League of Women Voters testified that the current General Assembly delegation was questioned in detail on a number of issues during the campaign which led to their election and they submitted a team answer on every point. [App. 169-173] These assemblymen included three negroes who, after being elected to the General Assembly [despite a three to one vote against them favoring their losing white opponents in the Ghetto Area —See Admitted Request For Admission No. 66, App. 104] followed the vote of their party even on bills which obviously would have an invidious effect upon black voting rights. [See Exhibits 17 through 24] These bills included an act to cause the Marion County Council to be multi-member districted at large where it previously had been elected from single-member districts, a bill which, among other things, would cause the Mayor of Indianapolis to be elected from the entire county without any change in tax districts causing black people to become only 16% of the Mayor's constituency instead of 24%[5] and a bill permitting an all-white part of Gary, to secede from Gary

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[5] This statute subsequently was declared unconstitutional in part in three respects because it constituted a black voting rights violation. The decision was rendered by Judge William E. Steckler, one of the three judges who rendered the lower court's decision herein and no appeal was taken from Judge Steckler's decision because the said black voting rights violations were acknowledged.

as a response to the recent election of a black man [Mayor Richard Hatcher] as Mayor of Gary, Indiana.[6]

It was thus demonstrated that Marion County's multi-member district legislative delegations vote *en bloc* in the legislature and "speak with one voice" and that Banzhaff's mathematical study is no mere "ivory tower" exercise. The present legislative apportionment plan in Indiana permits Marion County, Indiana voters to participate in the election of more legislators than any other voter or group of voters in Indiana has the opportunity to select. This delegation which is elected by Marion County voters is sufficient in size to have a disproportionate effect upon the prospects of all pending legislation since it has, as a matter of course, a far greater likelihood that its "one voice" decisions will create a bandwagon effect propelling a prospective bill through the legislative processes or an ultimate effect of passing a bill which is the subject of a split-decision at a final roll call. This is not to say that the multi-member districts of differing size which exist in Indiana provide the actual Marion County voter with any cognizable advantage. The evidence summarized immediately above and other evidence summarized elsewhere in this brief demonstrates that the power which accrues to Marion County as a result of its multi-member-bloc accrues only to its political bosses and not to its people because the ethnic and socio-economic bloc votes of its citizens which largely dominate the county-wide vote effectively cancel each other out. The voting-power disadvantages which Marion County citizens suffer as a result of multi-member districting and the mathematical advantages which the county as a whole "enjoys" as a result of such districting do not offset each other. The invidious effects which result from the said

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[6] This bill never became law only because it was stolen from a stack of bills being transmitted to the office of the Governor of Indiana for signing.

"advantages" and disadvantages are cumulative. Multi-member legislative districts of differing size give power to certain political machines and deny the rights of voters within the entire voting system.

On the basis of the above-described evidence and on the basis of additional evidence which was presented at the trial but which has not been summarized herein the lower court arrived at the following conclusion:

> Much has been said, before and during the trial of this case, concerning the 'critical vote' analysis of Banzhaf, *Multi-Member Electoral Districts — Do They Violate the 'One Man, One Vote' Principle*, 75 Yale L.J. 1309, esp. 13 19-24 [1966]. Cf. *Kilgarin v. Hill*, 386 U.S. 120, 125 n. 3 [1967]. This analysis purports to show that where district A elects one representative from two candidates and District B, which is eight times as populas as District A, elects eight representatives from sixteen candidates, voters in District B cast more 'critical votes' i.e. break a theoretical tie, than voters in District A. We take a similar and simpler view of the situation than is presented in the cited article. Applying the analysis for example to the facts in this case, voters in Johnson and Bartholomew Counties, a single-member senatorial district, choose between two senatorial candidates while voters in Marion County choose between sixteen candidates for eight Senate seats. It is clear that each voter in Marion County has a greater theoretical opportunity to cast a critical vote or deciding vote in any legislative election under the present districting scheme.
>
> John Banzhaf, Associate Professor of Law at George Washington University, testified that when the representatives of a multi-member district vote as a bloc in a legislative body, each representative's vote has a greater weight that that of a representative from a single-member district. Having found that the Marion County elected delegations usually

> do vote in blocks, we believe that the testimony has application here. (App. 377, 378)

This finding and conclusion by the lower court was very substantially supported by the evidence.

In addition to those noted by the lower court the appellees presented other reasons why Indiana's multi-member districts of varying size constitute a one-man-one-vote violation. The appellees showed in their complaint [App. 76, 77 & 80] with help from admitted requests for admissions 85—92 [App. 107, 108] that there are 36 sparsely populated, single-member districted counties in Southern Indiana with an area about 30.7 times that of Marion County, Indiana. It was further shown that the typical [median] party victory of one major party over the other in these 36 counties in the last election involved a margin of only 5.91% while the typical party victory of one major party over the other in each of the forty voting wards in Marion County in the last preceding election involved a voter margin of 30.30%. Thus there was a near two-to-one victory of one major party over the other [with 13 of the wards heavily favoring the losing party and 12 of the wards heavily favoring the winning party] in the forty voting wards of Marion County while nothing approaching such a result obtained in the 36 southern rural counties of Indiana which contained a population approximately equal to that of Marion County. While there could be a rational basis for multi-member-districting the said rural portion of Indiana with its homogenous voter instincts there could not be a rational basis for creating a multi-member-district bloc out of the highly heterogenous metropolitan area in Marion County. Yet this is what has taken place and the said multi-member districting, when viewed in the light of certain recent decisions of this Court, presents a probable Constitutional crisis which should be resolved before the legisla-

tures of most of the states meet in early 1971 to reapportion themselves.

Recent decisions of this Court have eliminated traditional political subdivisions as a basis for curtailing the quest for mathematical perfection in achieving one-man-one-vote among legislative districts. At least one such decision has contained a concerned warning by a Justice of this Court to the effect that the elimination of traditional geographic sub-divisions as a consideration causes the one-man-one-vote mandate of this Court to become a plausible tool for gross political gerrymandering. This Court, in the past, has disregarded potential or actual gerrymandering between the two major political parties in this country, probably because neither of them represent cognizable ethnic or socio-economic interest groups and because both of them, to a substantial extent, represent a cross-section of citizens and voters as a whole. Notwithstanding this fact, the prospect of wholesale legislative reapportionments following the coming United States Census under this Court's current guidelines presents a very significant problem.

While the thirty six counties whose recent voting records are set forth at [App. 80] could be apportioned in almost any manner without having any significant effect upon the voting rights of the citizens therein, these rural counties undoubtedly have socio-economic if not ethnic enclaves. But these enclaves [in view of the voting patterns and small voting population of these counties] necessarily must be so small as to be so insignificant from a political cartographer's standpoint in the case of legislative districts which must be equal to one percent of the entire state, that neither political nor socio-economic nor ethnic gerrymandering can take place. Quite to the contrary, the Marion County Metropolitan Area presents a great potential for

such gerrymandering [as do all of the other metropolitan areas in the state]. This is so, however, only if districts of different size are permitted. For example, if all of the wards except 1, 3, 4, 5, 6, 7, 11, 12 and 23 of those shown in the table at App. 76-77 were made into one multi-member district in Marion County and if the abstracted wards were made into another, smaller multi-member district, the political identity of legislators from Marion County would become permanently fixed, for all practical purposes, absent a massive political realignment of the type that normally takes many years. In a like manner the political propensities of the citizens in metropolitan areas could be played upon throughout the state by the party in control at the time of reapportionment to an extent that was unknown when county lines constituted an inhibiting factor. There is an obvious need for a new inhibiting factor which will be consistent with the dictates of *Kirkpatrick v. Preisler*, 394 U.S. 526 [1969] and *Wells v. Rockefeller*, 394 U.S. 542 [1969]. A uniform districts requirement would provide such a factor in addition to rectifying the one-man-one-vote violation inherent in multi-member districts of different size which heretofore has been demonstrated.

III

The Other Matters Raised By The Appellants Are Of No Substantial Significance

Certain other matters raised by the appellants deserve some mention in this brief, but only because they have been raised. These matters are either moot or they are based on assertions which are manifestly false.

A

The Lower Court's Decison And Judgment Were Not Expressly Designed To Freeze In Place The Geographical And Political Integrity Of A Cognizable Racial Minority Group Found To Reside Within The Center Township Ghetto Area For The Sole Purpose Of Preserving Its Voting Strength" As The Appellant Whitcomb Claims

In its initial opinion the lower court made it very clear that it would not accept any racism-in-reverse-gerrymandering-in-reverse reapportionment which would bear the earmarks of an attempt to create "black legislative seats" as such:

> "In this regard, the Court in no way intends to intimate by this opinion that the Negroes residing in the Center Township Ghetto are entitled to a certain number of legislators. Legislative districts are to be drawn with an eye that is color-blind;" (App. 377)

In a manner entirely consistent with this pronouncement the lower court, after the State of Indiana refused to reapportion its legislature, mandated a reapportionment plan which in no way made the Ghetto Area a world unto itself. The districts drawn in Marion County consist of squares and rectangles made up of census tracts and census blocks and they form a grid which almost entirely disregards the boundaries of the Ghetto Area. [See Appendix A, Pg. 15, Motion To Dismiss or Affirm And, In The Alternative, Emergency Motion To Advance Case And To Set Early Dates For Filing Of Briefs]. A plan calculated to enhance the voting power of the Ghetto Area would differ considerably from the plan adopted. Such a plan would have no districts entirely within the Ghetto Area because having a minority of non-ghetto voters in each district would increase the total number of districts which the ghetto area voters could control. Such a plan likewise

would have no districts in which the Ghetto Area provided a minority portion of such districts because, from a political cartographer's viewpoint, minority votes in a district are wasted votes. The Court drawn districts include five which include parts of the Ghetto Area. Two of these are almost entirely Ghetto while the remaining three consist mostly of non Ghetto Areas. No political cartographer intending to create a Ghetto voting power bloc would have drawn the district in this manner. There is absolutely no factual basis for the appellant Whitcomb's claim that the districts drawn by the lower court were designed to enhance the voting power of the Ghetto Area.[7]

The appellant Whitcomb's claim that the lower court's districting plan is calculated to "preserve the political voting strength" of the Ghetto Area is entirely spurious. All of the evidence in the lower court was to the effect that the Ghetto Area had no voting power notwithstanding its tendancy to bloc vote and there was no suggestion to the contrary by any of the parties. The only positive effect which the lower court's action has had upon the voting power of the Ghetto Area results solely from the inevitable effect of impartially drawn single-member districts.

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[7] Although this Court stayed the lower court's order implementing its district plan one of the major political parties in Marion County held district "mini-slating conventions" for purposes of determining its legislative candidates. All of the slated candidates were subsequently nominated in the primary. Black candidates filed in the slating conventions in six of the fifteen Marion County "districts" including the five which contain parts of the ghetto area. Only two black candidates were slated and nominated including one in the district which contains only a very small part of the ghetto area where the black candidate overwhelmingly defeated the white candidate in a head-on race notwithstanding a very substantial white voting majority. In a district that was almost entirely ghetto a white candidate won almost all of the vote in a head-on race against a black candidate who campaigned primarily on the basis of skin-color. All five of the candidates in the "ghetto districts," however, avowed a substantial commitment to the substantive interests of black people and the poor.

B

The Existing Apportionment Plan Declared Invalid By The Lower Court Contained Deviations From The Ideal Which Were Greater Than Any Ever Approved By This Court And The Fact That It Previously Had Been "Approved" By A Three-Judge Federal Panel "Without Prejudice" To Further Attacks Is Of No Legal Significance

The Lower court made the following findings of fact which are undisputed:

> The ratio between the largest and the smallest district according to the 1960 figures is 1.327 to 1. The deviation from the ideal population per senator is greater than 14%, in one district, is greater than 13% in one more district, and is greater than 10% in still five other districts'' (App. 370)
>
> "The ratio between the largest and the smallest district, according to the 1960 figures is 1.279 to 1. The deviation from the ideal population per representative according to the 1960 population figures is greater than 13% in one district, is greater than 11% in one more district, and is greater than 10% in still three more districts." (App. 371)

The context of the above-given facts the lower court was faced with the duty of implementing the following mandate of this Court in *Kirkpatrick v. Preisler,* 394 U.S. 526, (1969).

> "Equal representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives. Toleration of even small deviations detracts from these purposes." *Kirkpatrick v Preisler,* supra at U.S. 531.

The deviations existing in this case were far greater than those which had been found in *Kirkpatrick v. Preisler* and

they were greater even than those which Justice White had characterized as tolerable in his dissent to the *Kirkpatrick v. Preisler* decision.

The apportionment plan which the lower court found to be unconstitutional had been approved by a different three-judge panel in the lower court, *Stout v. Bottorff*, 249 F.Supp. 488 [D.C. Ind. 1965] in a decision from which no appeal was taken. But in this earlier decision the district court in no way expressed itself as contemplating that its judgement was absolute and final. In fact the *Stout v. Bottorff* decision specifically states that it was rendered without prejudice to subsequent attacks upon the multi-member districting feature of the plan being approved. This case constituted just such an attack.

Moreover, the apportionment plan approved in *Stout v. Bottorff*, was decided shortly after *Reynolds v. Sims*, 377 U.S. 633 [1964] and long before the refinement to guidelines had taken place in cases such as *Swann v. Adams*, 385 U.S. 440 [1967]; *Sincock v. Gately*, 262 F. Supp. 739 [D.C. Del. 1967] and *Long v. Docking*, 283 F. Supp. 539 [D.C. Kan. 1968].

C

The Implementation Of One-Man-One-Vote Requirements May Not Be Postponed Merely Because The End Of A Decade And A New Census Is Approaching

The appellant, Whitcomb, on pages 38 through 43 of his brief, urges that the lower court should have awaited the taking of the 1970 census before ordering a reapportionment of the Indiana General Assembly. The appellant endeavors to bolster this assertion by claiming that the 1960 census figures had become "outdated."

None of the appellant's figures which indicate deviations between the 1960 census results and the actual population in the suburban metropolitan areas of the state were presented at the trial of this cause. They were presented, rather, in unverified pleadings submitted after the State of Indiana had been given sixty days to reapportion itself and after the lower court had been forced by the State's inaction to undertake a court-drawn reapportionment plan.

Notwithstanding the aforesaid defects in the appellant, Whitcomb's presentation the appellees will conceed that the 1960 census contained population figures which substantially deviated from the actual population of the suburban areas surrounding the large metropolitan areas of the state as of the time of trial. This is a fact which would be obvious to anyone traveling through the State of Indiana and it probably is true of every metropolitan area in the United States.

The build-up of suburban communities, however, does not present a valid basis for delaying the implementation of one-man-one-vote requirements. Newly constructed suburban areas are voluntarily occupied by citizens who inevitably suffer a dearth or shortage of many types of governmental services during the first few years of occupancy. There is no possible legal significance to the fact that a citizen's moving into a suburban area between censuses will cause he and his fellow suburbanites to suffer a vote dilution until the next census is performed. This is particularly true in view of the fact that same dilution will take place regardless of when the reapportionment is performed, either early or late in the decade.

The United States Census is the only existing reliable basis for state-wide reapportionments and it is the tool for reapportionments which was specifically provided for by the Constitution of the United States. Although it is a set

of statistics which, like any other set of statistics, can become outdated, the Constitutional provision which requires a census every ten years presents a sufficient safeguard to prevent any substantial one-man-one-vote voting-rights deprivations. The use of other demographic sources in the conducting of reapportionments and rulings that reapportionments should await the taking of a census would add a substantial degree of arbitrariness to reapportionment decisions. An end to repeated reapportionment litigation can be accomplished only if the guidelines are simple and contain no exceptions.

The appellant, Whitcomb cites cases in which other courts decided to forego a reapportionment until new census statistics are available. In view of the stay which has been issued by this Court in this case that is essentially what has happened here because 1970 census statistics will be available before the next Indiana General Assembly primary takes place. For this reason the question of timeliness that is presented in this case is a moot question for all practical purposes. To the extent that this Court may consider that question, however, the appellees urge that no basis for any delay in reapportionment matters should be given recognition. This would be akin to the ill-fated "all deliberate speed" guidelines which this Court previously adopted in another civil rights area.

D

The Absence Of Proof That The Multi-Member Districting Of Marion County Was Intended To Dilute The Vote Of Minority Groups Is Of No Significance.

The evidence showed that no county in Indiana during the one hundred thirty years of its history ever has been sub-divided for purposes of creating smaller legislative

districts.[8] Because this policy pre-dated the existence of metropolitan areas and racial and ethnic enclaves of substantial size there was no basis for asserting that the

[8] This is not to say that Indiana has no history of voting apportionments intentionally devised to dilute the vote of racial and ethnic minorities. Indiana has a very extensive history of such invidious apportionments as shown by the following quoted footnote in a decision in a case related to this one wherein one of the judges of the lower court found a local apportionment statute enacted by the present legislature to constitute a black voting rights violation on three counts. "The original councilmanic district ordinance under the present Indiana Constitution was enacted in 1852 and provided that all city councils should be elected from fifteen single-member districts at annual elections. [Acts 1852, vol. 1, pg. 205.] Then in 1855 a local election was conducted in Indianapolis under fear of rioting by foreign-born Germans [Indianapolis Journal, April 25, 1855, pg. 1] and the results of the election were lamented in the local press because "the Dutch bunch" elected three representatives to the fifteen single member district council. [Indianapolis Journal, May 2, 1855, pg. 3.] At the next session of the General Assembly a new statute was enacted providing for the organization of cities which permitted a city to be divided into as few as three councilmanic districts with two councilmen to be chosen from each district at biennial elections for staggered terms of four years thus diminishing the probability of minority bloc influence. [Acts 1857, pg. 44, secs. 8 and 9.] By 1880 the foreign born constituted slightly more than twenty percent of the population of Indianapolis [these and subsequent similar figures are from appropriate U.S. Census] and in 1881 the General Assembly enacted a city council statute applicable only to Indianapolis creating an additional councilmanic house of aldermen to be elected from districts three times as large as those from which the regular councilmen were to be elected. [Acts 1881, pg. 14.] By 1890 persons of Germanic descent included about 27% of the City of Indianapolis and the following year the General Assembly amended the Indianapolis city council statute eliminating the Board of Aldermen and adding six members to the Council itself to be elected at large. [Acts 1890, pp. 140, 141.] Then, in 1909 the Indianapolis or "First Class City" councilmanic statute was again amended to provide that all members of the council would be elected at large [Acts 1909, pg. 341]. The bill was introduced by a sponsor who stated that the intendment of the act was that "only the better class of men would be chosen" to serve. [Indianapolis News, February 5, 1909, pg. 2, col. 2.] Whatever trend can be discerned from these historical facts must be regarded as largely reversed by the single-member districting feature of the questioned statute. These facts do demonstrate, however, that the problem judicially noted in *Gomillion v. Lightfoot*, 364 U.S. 399 [1960], is neither new nor confined to the emerging negro voting minority and it is one which will probably persist as long as communities continue to be divided into socioeconomic and ethnic enclaves." *Bryant v. Whitcomb*, — F.Supp. — (D.C. Ind. 1970).

legislative districts in Indiana were designed to dilute the vote of minorities. In both *Fortson v. Dorsey*, 397 U.S. 433 [1965] and *Burns v. Richardson*, 384 U.S. 73 [1966] this court stated that multi-member legislative districts are illegal if they "operate to minimize or cancel out the voting strength of racial or political elements of the voting population" either "designedly or otherwise." Appellees believe that this guideline is manifestly correct because the intent behind a massive voting rights dilution can have no relevance to the problems caused by the invidious harm that is brought about by such a dilution.

E

Whether The Appellant Whitcomb Was Entitled To Have County Lines Retained As The Sole Basis For Dividing Districts

On pages 46 through 49 of his brief the appellant, Whitcomb argues that county lines should not have been crossed in drawing senate districts for the Indiana General Assembly because the Indiana Constitution prohibits it.

It is arguable whether the Indiana Constitution prohibits the crossing of county lines for the purpose of creating single member senate districts. The Indiana Constitution merely provides that no county "shall ever be divided" for purposes of creating senate districts in a provision which, at the same time, provides that districts consisting of more than one county shall consist of contiguous counties. It is entirely plausable to assert that this provision relates only to multi-county districts and that it was not drafted in contemplation of anything resembling the problem at hand. No Indiana Court ever has interpreted the Constitutional provision in question in a manner that is pertinent here.

It also is arguable, however, that the appellant, Whitcomb's interpretation of the Indiana Constitutional provision in question is entirely correct. Conceeding arguendo that his interpretation is correct it remains to be seen whether the integrity of county lines can provide a justification for one-man-one-vote deviations in Indiana within the guidelines set by this Court.

In final arguments at the trial in the lower court it was asserted by the appellees that the apportionment plan under attack represented the best that could be done from the one-man-one-vote standpoint and this assertion was in no way contradicted by the appellants at that time or since that time. Given the fact that the plan contains deviations of well over fifteen percent, it necessarily follows that the disregarding of some county lines was imperative.

In this connection the lower court made every reasonable effort to uphold the Indiana Constitution in its drawing of an apportionment plan for Indiana:

> "Persons desiring to submit plans were ordered to file notice of their intent to do so on or before October 24, 1969. The Court announced that 1960 census data would be used as a basis for redistricting; that single-member districts would be preferred to multi-member districts; and that county and township boundary lines would be crossed in drawing district lines wherever necessary to achieve equality of population in the districts but that the Court would strive to preserve the integrity of county and township lines." (App. 392)

Under the Supremacy Clause of the United States Constitution the lower court could have done no more than it did.

CONCLUSION

There was a sound evidentiary basis for the lower court to conclude that the guidelines set forth in *Fortson v. Dorsey*, 397 U.S. 433 (1965) and *Burns v. Richardson*, 384 U.S. 73 (1966) required the sub-division of the multi-member legislative districts in Marion County, Indiana and the other existing one-man-one-vote mandates of this Court required the lower court to take action to alleviate the mal-apportionment of the conventional type which readily was apparent in the light of all available population statistics. None of the existing guidelines to be found in the past decisions of this Court provided any basis for ignoring this mal-apportionment because of the nearness of the 1970 Census or because of the population shifts which had taken place since the 1960 Census.

The only action by the lower court which was not firmly supported by the existing guidelines of this Court was its suggestion that the Indiana General Assembly should consider the principle of uniform districting in conducting its apportionment and its following of its own suggestion when the inaction of the State of Indiana forced it to draw its own apportionment plan. While this action by the lower court was not pursuant to prior guidelines set by this Court it was in no way inconsistent with such guidelines and it too had a firm evidentiary basis.

More important, perhaps, than the reasons heretofore given supporting the thesis that uniform districting is Constitutionally required under the facts apparent in this case is the further fact that requiring such districting will have the additional effect of providing an unmistakable guideline by which reapportionment issues arising out of the existence of ethnic enclaves will be effectively eliminated from one-man-one-vote litigation in all instances

where the uniform districts are kept reasonably small (a likely result in all of the states because of the obvious practical hardships which very large uniform districts would work upon rural areas). Such districts also would have the heretofore mentioned advantages of rendering partisan gerrymandering almost impossible and of rendering the guidelines expressed in *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969) and *Wells v. Rockefeller*, 394 U.S. 542 (1969) entirely workable. The "strict" guidelines in *Kirkpatrick* and *Wells* are and will remain unworkable absent continued court litigation so long as endless varieties of multi-member districts of varying sizes are available to apportioning legislatures and comparisons between contesting plans remain difficult if not impossible.[9] All of the actions taken by the lower court conform to the existing guidelines of this Court and the further action required to implement those guidelines.

WHEREFORE, Appellees pray that the actions of the trial court be approved in all respects and affirmed in all aspects not already effectively reversed by the stay order issued herein.

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[9] For example, the inclusion of an entire state in one multi-member district inevitably would result in the "best" possible plan and this would be so regardless of what population statistics were used or however outdated such statistics might be or become. No other proposed apportionment plan possibly could compete with such a plan under naive one-man-one-vote criteria. Such a plan also would avoid the problem of crossing county lines and this problem as well as population discrepancy problems will tend to manifest themselves and increase as districts become smaller. Thus *Wells* and *Kirkpatrick* will militate against the drawing of small districts calculated to achieve minority representation and plans featuring large, sprawling districts inevitably will be favored notwithstanding the greater potential for gerrymandering of all types in the drawing of such districts. Absent a uniform districting requirement and a policy favoring small districts a substantial amount of reapportionment litigation will be present throughout the coming decade and stability in apportionment matters will not be achieved.

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